Syed Mohamed bin Syed Alwi & Ors v Shariffah Badariah bt Alwi Al-Attas & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NOS (MT-1) 22–411 OF 2002, 22–412 OF 2002 AND 22–413 OF 2002
VERNON ONG JC
24 NOVEMBER 2009

Civil Procedure — Fraud — Standard of proof in civil action — Whether deceased donor physically and mentally incapacitated — Whether withdrawals of RM1.125m from deceased's account with Lembaga Untuk Tabung Haji made fraudulently — Whether transfer of shares by deceased were in furtherance of dishonest and fraudulent scheme by defendants

Equity — Gift — Transfer of shares in company and one-half share of properties — Whether donees of gift and deceased donor stood in fiduciary position — Whether transfers resulted in breach of trust or breach of fiduciary duty — Whether deceased donor physically and mentally incapacitated

Syed Hamid bin Syed Alwee ('the deceased') was the eldest surviving heir sibling of the plaintiffs and the first to third defendants prior to his demise on 24 April 2000. Zainah Al-Attas Sdn Bhd ('ZASB'), the fourth defendant, was their family company. From 1996 to his demise in 2000 the deceased, who was suffering from cerebral infracts, hypertension, diabetes mellitus and dementia, was living under the care of his sister, the first defendant. The doctor who treated the deceased was of the view that the deceased's physical and mental condition was gradually deteriorating and therefore advised the deceased to appoint someone, preferably a sibling, as his attorney under a power of attorney ('PA') to withdraw money to pay for the deceased's medical expenses and other necessaries. The doctor also wrote a letter addressed to a firm of solicitors asking that they assist the deceased in drawing up such a PA. The first and third defendants approached the firm of solicitors with this letter and after a few meetings a PA was drafted as directed by the deceased with the first and second defendants as the deceased's attorneys. The deceased, who was certified by his doctor as mentally competent at that time, executed the PA after the same was explained to him by the solicitor. As between 8 May 1998 and 29 February 2000, the deceased had also withdrawn a total sum of RM1.125m from his account with Lembaga Untuk Tabung Haji ('LUTH') by affixing his thumbprint on the cash withdrawal forms. On 20 February 1998, the deceased transferred 146,708 shares in ZASB and 28,001 shares in Ladang Badariah Sdn Bhd ('LBSB') to the first defendant. On 14 October 1999, the deceased instructed a lawyer, one Rodziah, that he wished to make a gift of one-half share

in his properties, held under Lots 7346 and 7347 ('the properties'), to the first defendant and another younger sister. The *surat ikatan hadiah* and the relevant transfer forms were drawn up and executed by the deceased. However the transfer could not be registered because of a caveat lodged by the plaintiffs. The plaintiffs commenced three separate suits against the defendants. These three separate suits, which were subsequently consolidated, disputed the validity of three separate transactions, namely the withdrawal of RM1.125m from the deceased's account with LUTH, the transfer of 146,708 shares in ZASB and 28,001 shares in LBSB and finally the gift of one-half of his share of the properties. It was the plaintiffs' contention that the withdrawals of RM1.125m from his account with LUTH were made fraudulently using the deceased's forged thumbprint; that the first and second defendants misled, tricked and exploited the deceased who was mentally and physically infirmed to transfer the shares in ZASB and LBSB into their names and that the said transfer was fraudulent and ultra vires; and that in furtherance of their dishonest and fraudulent scheme the defendants had deprived the deceased of his one-half share of the properties. The plaintiffs also submitted that there was a guardian and ward relationship and fiduciary or trustee relationship between the defendants and the deceased, who was in their care, and that the defendants could not exploit this position to profit themselves. During the trial the defendants adduced evidence that the withdrawal forms for the monies withdrawn from the LUTH account were verified by LUTH staff; that the share transfer transactions were attended to by the manager of a company secretarial firm whom the deceased had called on the phone to come to the house; and that the execution of the *surat ikatan hadiah* were witnessed by a close friend. Consequently the defendants counterclaimed for the removal of the caveats entered against the properties, compensation and costs.

Held, dismissing the plaintiffs' claims with costs and allowing the defendants' counterclaim with costs:

(1) Whether or not the deceased was mentally incapacitated at the material time was a question of fact. The opinion of the doctor who treated the deceased, which was relevant and carried considerable weight, corroborated the testimonies of the first to third defendants regarding the deceased's physical and mental condition. It showed that the general and mental condition of the deceased was fair and satisfactory and that the deceased was not mentally incapacitated from 1998 until the date of his admission into hospital on 29 February 2000. However, it was also necessary to assess the question on the totality of the medical and lay evidence. In this case, the doctor's evidence was also consistent with the evidence of the solicitor who attended to the preparation and execution of the PA. There was also the independent corroborative evidence of other third parties such as Rodziah, the lawyer who drew up the *surat ikatan hadiah* and the

relevant transfer forms, the close friend who attested the deceased's signature on the *surat ikatan hadiah*, the manager of a company secretarial firm who attended to the transfer of shares in ZASB and LBSB and the officers from LUTH who attended to the deceased for the withdrawals from his account with LUTH. As such, it was clear that the deceased was not physically and mentally incapacitated from 1998 onwards and only became so incapacitated on 29 February 2000 (see paras 19 & 21–23).

(2) Since the plaintiffs alleged that the withdrawal of RM1.125m from his account with LUTH was made fraudulently using the deceased's forged thumbprint, the onus was upon them to establish the alleged fraud. The standard of proof for an allegation of fraud in civil proceedings is that of proof beyond reasonable doubt. In the present case there was no evidence to show that the thumbprints affixed on the cash withdrawal forms were forged or that the withdrawals were made fraudulently. In fact the evidence showed that the transactions were all carried out in the normal course of business, in accordance with LUTH policies, and with no impropriety or irregularity (see paras 24–26).

(3) The transfer of the shares from the deceased to the first defendant was a transfer from one shareholder to another and was not subject to any restrictions. As such the restrictions of transfer contained in the articles of association of ZASB would not apply. Further, even if the first defendant was in a position to dominate the deceased's will, the transfer of shares to the first defendant would not be declared void because the latter had shown to the court's satisfaction that the deceased was competent and had obtained independent advice in making the gift of the shares (see para 27).

(4) On the issue of the gift of the one-half of his share of the properties, it was found that there was nothing to justify the plaintiff's assertion that there was a dishonest and fraudulent scheme (see para 28).

[Bahasa Malaysia summary

Syed Hamid bin Syed Alwee ('si mati') merupakan anak sulung yang masih hidup daripada saudara kandung waris plaintif-plaintif dan defendan-defendan pertama hingga ketiga sebelum dia meninggal dunia pada 24 April 2000. Zainah Al-Attas Sdn Bhd ('ZASB'), defendan keempat, adalah syarikat keluarga mereka. Dari tahun 1996 sehingga dia meninggal dunia pada tahun 2000 si mati, yang menderita penyakit serebrum infracts, hipertensi, kencing manis mellitus dan demensia, tinggal di bawah jagaan adik perempuannya, defendan pertama. Doktor yang merawat si mati berpendapat bahawa keadaan fizikal dan mental si mati semakin merosot dan oleh itu telah menasihatkan si mati melantik seseorang, sebaik-baiknya saudara kandung,

sebagai wakilnya di bawah surat kuasa wakil ('SKW') untuk mengeluarkan wang bagi membayar perbelanjaan perubatan dan barang-barang keperluan lain si mati. Doktor juga menulis sepucuk surat yang dialamatkan kepada firma guaman meminta bantuan mereka membuat SKW si mati. Defendan-defendan pertama dan ketiga telah ke firma guaman itu dengan surat ini dan selepas beberapa perjumpaan satu SKW telah dibuat sepertimana diarahkan oleh si mati yang mana defendan-defendan pertama dan kedua sebagai wakil si mati. Si mati, yang telah disahkan oleh doktornya sebagai tidak kompeten dari segi mental pada masa itu, telah menyempurnakan SKW itu selepas ia dijelaskan kepadanya oleh peguam. Antara 8 Mei 1998 dan 29 Februari 2000, si mati juga telah mengeluarkan sejumlah RM1.125 juta daripada akaunnya dalam Lembaga Untuk Tabung Haji ('LUTH') dengan menurunkan cap jarinya pada borang-borang pengeluaran tunai. Pada 20 Februari 1998, si mati telah memindahkan 146,708 saham dalam ZASB dan 28,001 saham dalam Ladang Badariah Sdn Bhd ('LBSB') kepada defendan pertama. Pada 14 Oktober 1999, si mati telah mengarahkan peguam, Rodziah, bahawa dia berhasrat untuk memberi hadiah sejumlah satu pertiga daripada hartanahnya, dipegang di bawah Lot-lot 7346 dan 7347 ('hartanah tersebut'), kepada defendan pertama dan seorang lagi adik perempuan. Surat ikatan hadiah dan borang-borang pemindahan yang berkaitan telah dibuat dan disempurnakan oleh si mati namun begitu pemindahan itu tidak dapat didaftarkan kerana kaveat telah dimasukkan oleh plaintif-plaintif. Plaintif-plaintif telah memulakan tiga guaman berasingan terhadap defendan-defendan. Ketiga-tiga guaman berasingan tersebut, yang kemudiannya telah digabungkan, telah dipertikaikan kesahan tiga transaksi berasingan, iaitu pengeluaran RM1.125 juta daripada akaun si mati dengan LUTH, pemindahan 146,708 saham dalam ZASB dan 28,001 saham dalam LBSB dan akhirnya hadiah sejumlah satu pertiga daripada bahagian hartanahnya. Plaintif-plaintif berhujah bahawa pengeluaran RM1.125 juta daripada akaunnya dengan LUTH telah dibuat secara fraud menggunakan cap jari si mati yang dipalsukan; bahawa defendan-defendan pertama dan kedua telah memperdaya, menipu dan mengeksploitasi si mati yang dari segi mental dan fizikal tidak berdaya untuk memindahkan saham dalam ZASB dan LBSB kepada nama-nama mereka dan bahawa pemindahan tersebut adalah secara fraud dan ultra vires; dan bahawa berikutan rancangan mereka yang tidak jujur dan secara fraud itu defendan-defendan telah menafikan si mati satu pertiga daripada bahagian hartanahnya. Plaintif-plaintif juga telah berhujah bahawa terdapat hubungan penjaga dan orang yang dijaga dan hubungan fidusiari atau pemegang amanah antara defendan-defendan dan si mati, yang berada dalam jagaan mereka, dan bahawa defendan-defendan tidak boleh mengeksploitasi kedudukan ini untuk manfaat mereka. Semasa perbicaraan defendan-defendan telah mengemukakan keterangan bahawa borang-borang pengeluaran untuk wang yang dikeluarkan daripada akaun LUTH telah disahkan oleh kakitangan LUTH; bahawa transaksi pemindahan saham itu telah diuruskan oleh pengurus firma kesetiausahaan syarikat yang telah ditelefon oleh si mati untuk

datang ke rumah; dan bahawa penyempurnaan surat ikatan hadiah itu telah disaksikan oleh kawan rapat. Berikutan itu defendan-defendan telah menuntut balas pembatalan kaveat-kaveat yang dimasukkan ke atas hartanah-hartanah tersebut, pampasan dan kos.

Diputuskan, menolak tuntutan-tuntutan plaintif-plaintif dengan kos dan membenarkan tuntutan balas defendan-defendan dengan kos:

(1) Sama ada si mati tidak berupaya dari segi mental pada masa matan adalah satu persoalan fakta. Pendapat doktor yang merawat si mati, yang relevan dan boleh dikatakan penting, telah menyokong testimoni-testimoni defendan-defendan pertama hingga ketiga berkaitan keadaan fizikal dan mental si mati. Ia menunjukkan bahawa keadaan biasa dan mental si mati adalah baik dan memuaskan dan bahawa si mati bukannya tidak berupaya dari segi mental dari tahun 1998 hingga tarikh kemasukannya ke hospital pada 29 Februari 2000. Walau bagaimanapun, adalah juga perlu untuk menilai persoalan tentang keseluruhan perubatan dan keterangan yang dibentangkan. Dalam kes ini, keterangan doktor juga adalah konsisten dengan keterangan peguam yang menghadiri persiapan dan penyempurnaan SKW itu. Juga terdapat keterangan sokongan berasingan pihak ketiga lain seperti Rodziah, peguam yang membuat surat ikatan hadiah dan borang-borang pemindahan berkaitan, kawan rapat yang telah mengakui tandatangan si mati atas surat ikatan hadiah, pengurus firma kesetiausahaan syarikat yang menguruskan pemindahan saham-saham dalam ZASB dan LBSB dan pegawai-pegawai daripada LUTH yang menguruskan pengeluaran si mati daripada akaunnya dengan LUTH. Oleh itu, adalah jelas bahawa si mati bukannya tidak berupaya dari segi fizikal dan mental dari tahun 1998 dan hanya menjadi tidak berupaya pada 29 Februari 2000 (lihat perenggan 19 & 21–23).

(2) Memandangkan plaintif-plaintif mengatakan bahawa pengeluaran RM1.125 juta daripada akuannya dengan LUTH telah dibuat secara fraud menggunakan cap jari palsu si mati, beban terletak ke atas mereka untuk membuktikan fraud yang dikatakan itu. Piawai bukti untuk pengataan fraud dalam prosiding sivil adalah pembuktian melampaui keraguan munasabah. Dalam kes ini tiada keterangan untuk menunjukkan bahawa cap-cap jari yang diturunkan pada borang-borang pengeluaran wang tunai telah dipalsukan atau bahawa pengeluaran-pengeluaran itu telah dibuat secara fraud. Bahkan keterangan menunjukkan bahawa transaksi-transaksi tersebut telah dilaksanakan dalam urusan biasa perniagaan, menurut polisi-polisi LUTH, dan tanpa apa-apa yang salah atau luar aturan (lihat perenggan 24–26).

(3) Pemindahan saham-saham daripada si mati kepada defendan pertama

adalah pemindahan daripada seorang pemegang saham kepada seorang yang lain dan tidak tertakluk kepada apa-apa sekatan. Oleh itu sekatan-sekatan pemindahan terkandung dalam artikel persatuan ZXASB tidak terpakai. Bahkan, jikapun defendan pertama berada dalam kedudukan untuk menguasai wasiat si mati, pemindahan saham-saham defendan pertama tidak akan diisytiharkan sebagai tidak sah kerana defendan pertama telah membuktikan dengan memuaskan mahkamah bahawa si mati adalah kompeten dan telah memperoleh nasihat berasingan dalam memberikan hadiah saham-saham itu (lihat perenggan 27).

(4) Berhubung isu hadiah separuh daripada saham hartanahnya, adalah didapati bahawa tiada apa-apa untuk menjustifikasikan penegasan plaintif bahawa terdapat rancangan yang tidak jujur dan secara fraud (lihat perenggan 28).]

Notes

For cases on gift in general, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2606–2620.

For cases on standard of proof in civil action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2814–2815.

Cases referred to

Abrath v North Eastern Railway Co (1883) 11 QBD 440, CA

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Balasingham v PP [1959] MLJ 193, CA (refd)

Choo Ah Pat v Chow Yee Wah & Anor [1974] 1 MLJ 62, HC (refd)

Chu Choon Mooi v Ngan Sew Tin [1986] 1 MLJ 34, SC (refd)

Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23, HC (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627, HC (refd)

M Ratnavale v S Lourdenadin [1988] 2 MLJ 371, SC (refd)

PJTV v Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)

Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)

Selvaduray v Chinniah [1939] MLJ 253, CA (refd)

Wall Mohammad, etc Appellants v Faqir Mohamad & Ors, etc Respondents AIR 1978 Jammu & Kashmir 92 (distd)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

National Land Code Form 14A

Evidence Act 1950 ss 101(1), 102, 103

Thara Singh (Kushwinder Singh, Vijaykumar & Nizam Bashir with him) (Thara Singh Sidhu) for the plaintiffs.
Adi Radlan (Adi Radlan & Co) for the defendants.

Vernon Ong JC:

[1] The plaintiffs and the individual defendants are siblings. Zainah Al-Attas Sdn Bhd ('ZASB') is their family company. Syed Hamid, deceased ('Hamid') was their eldest surviving heir sibling of the plaintiffs and the defendants prior to his demise on 24 April 2000. Prior to Hamid's demise Hamid was living under the care of the defendants. During Hamid's lifetime monies in the aggregate of RM1.125m were withdrawn from his account with Lembaga Untuk Tabung Haji ('LUTH'). Hamid also transferred 146,503 shares in ZASB and 28,001 shares in Ladang Badariah Sdn Bhd ('LBSB') to Shariffah Badariah. In addition Hamid also made a gift of his one-half share of landed properties held under Lots 7346 and 7347 ('the properties') to Shariffah Badariah and Shariffah Nor. The plaintiffs filed three separate suits disputing the validity of the aforesaid transactions; the suits were subsequently consolidated. The plaintiffs' claims are as follows:

Suit No 22–411 of 2002 ('Suit 411')

A declaration that the wrongfully misappropriated sum of RM1,125,000 of the moneys/property of Hamid belongs to the estate of Hamid and was impressed with a trust and other ancillary reliefs.

Suit No 22–412 of 2002 ('Suit 412')

A declaration that the defendants restore to the estate of Hamid 146,503 shares in ZASB and 28,001 shares in LBSB and other ancillary reliefs.

Suit No 22–413 of 2002 ('Suit 413')

A declaration that the one half-share of the properties is the estate of Hamid and ancillary reliefs.

THE PLAINTIFF'S CASE

[2] In Suit 411 the plaintiffs contend that between 8 May 1998 to 29 February 2000 withdrawals in the aggregate sum of RM1.125m were made from Hamid's account with LUTH. The withdrawals were made fraudulently using Hamid's forged thumbprint. Consequently, the monies were impressed with a trust. The monies were utilised to purchase 357,298 shares in ZASB. Hamid was under the defendants' domination due to his mental and physical incapacities and exploited and deceived by the defendants into parting with his monies.

[3] In Suit 412 the plaintiffs assert that upon obtaining the power of attorney ('PA'), Badariah and Shariffah Fatimah ('Fatimah') wrongly deprived Hamid by having his 146,503 shares in ZASB transferred and registered in Badariah's name on 20 February 1998. It is contended that the defendants forced, misled and tricked, exploited Hamid who was mentally and physically infirmed at death's door to part with his shares in ZASB and LBSB even though he was under their authority and guidance as guardians and fiduciaries. The misappropriation of Hamid's shares was a breach of trust and a breach of fiduciary duty causing loss to Hamid and profiting Badariah. Fatimah assisted Badariah in this fraudulent and dishonest scheme.

[4] In Suit 413 the plaintiffs contend that in furtherance of a dishonest and fraudulent scheme the defendants deprived Hamid of his one-half share of the properties. Hamid was under the defendants' domination in their house due to his mental and physical incapacities. Rodziah bt Idris ('Rodziah') who personally handled matters for the defendants was also purporting to act for Hamid. Rodziah had absolute knowledge that Hamid was completely under the domination of the defendants and had knowledge of the PA obtained by Badariah and Fatimah.

[5] In all three suits it is also contended that there was a guardian and ward relationship and fiduciary/trustee relationship which produce a presumption that the defendants are deemed to be in a position to dominate the will of Hamid as he was completely dependent on them and vulnerable and are forbidden to exploit his position as fiduciaries when they accepted the authority and power under the PA, it could only be used for the benefit of Hamid and not profit themselves and their faction.

THE DEFENDANTS' CASE AND COUNTERCLAIM IN SUIT 413

[6] In respect of Suit 411, the monies were withdrawn by Hamid of his own free will and free of any undue influence. Hamid had affixed his thumbprint on the withdrawal forms for the monies which were verified by LUTH staff. Hamid's subsequent act of giving the money to Badariah was a spontaneous act of his own generosity and by his long-held trust and affection for Badariah. As an example of Hamid's affection for Badariah back in 1985 Hamid had executed a survivorship mandate of his LUTH account in favour of Badariah. In 1988 Hamid had given land Lot 91 to Badariah and Shariffah Nor. In 1998 Hamid had given a mandate to Badariah to operate his Hock Hua Bank current account. Finally, Hamid's actions in removing Hassan's caveat on the properties on 18 February 2000 was to pave the way for the intended transfer to Badariah and Nor.

[7] As for the shares in Suit 412, the defendants' contention is that they were transferred to Badariah on Hamid's own free will and independent thought. The share transfer forms were signed by Hamid and witnessed by Syed Sulaiman bin Syed Abdul Kadir. Zulkifli bin Hussein (DW12) called at the house to attend to the share transfer documentation. Hamid informed DW12 that he wanted to transfer all his shares in ZASB and LBSB to Badariah. Hamid also told DW12 to make the necessary arrangements to give effect to the transfer of the shares.

[8] In respect of Suit 413 before deciding to make the gift of the properties to Badariah and Nor, Hamid had obtained Rodziah's independent advice. Rodziah then drew up the *surat ikatan hadiah* on Hamid's instructions. Hamid's signatures on the *surat ikatan hadiah* and Form 14A of the National Land Code were witnessed by Md Nor @ Mohd Noah bin Ahmad (DW6) and Mohd Aidi bin Mohamad (DW10) respectively. The transfer could not be effected because of the caveats entered against the properties by Syed Hassan ('Hassan') and Shariffah Zaharah ('Zaharah'). Consequently, the defendants are counter claiming for the removal of the caveats entered against the properties, compensation and costs.

[9] In respect of all the above transactions it is the defendants' common stand that the defendants did not at any time use the PA or purport to act as attorneys for Hamid under the PA.

ISSUES TO BE TRIED

[10] There is one common thread connecting the plaintiffs' claim in the three suits. It is that at all material times Hamid was physically and mentally incapacitated and under the influence and dominion of the defendants. It is also contended that the defendants wrongfully used the PA for their own benefit and self-gain. In the circumstances, the defendants abused their positions as guardians of their ward, Hamid. The four questions to be determined are as follows:

(a) Whether Hamid was physically and or mentally incapacitated from January 1998?

(b) Whether the withdrawals of monies in the aggregate of RM1.125m were made fraudulently using Hamid's forged thumbprint?

(c) Whether the transfer of 146,503 shares in ZASB and 28,001 shares in LBSB from Hamid to Badariah was a misappropriation as a result of a breach of trust and breach of fiduciary duty by Badariah and Fatimah?

(d) Whether in furtherance of a dishonest and fraudulent scheme the defendants deprived Hamid of his one-half share of the properties?

A THE FACTS AS DISCLOSED BY THE EVIDENCE

[11] From 1996 till his demise in 2000 Hamid resided at No 1, Jalan Bumiputra, Stulang Laut, Johor Bahru together with Badariah. Hamid has been a patient of Dato' Dr Lim Kee Jin ('Dr Lim') since 1992. On 5 January 1998 Dr Lim issued a letter addressed to Messrs Mak, Ng, Shao & Kee a firm of solicitors asking that they assist in drawing up a power of attorney for Hamid. In that letter Dr Lim said that Hamid was being treated for cerebral infracts, hypertension, diabetes mellitus and dementia. Dr Lim also said that though Hamid was still mentally competent, Hamid was nearly wheel chair bound and unable to walk without help and his mental condition was gradually deteriorating; so it was important that Hamid appoint someone, preferably his siblings to act as his attorney under a power of attorney so that they can withdraw his money to pay for his medical expenses and in future to employ a maid for him.

[12] Badariah and Syed Salim ('Salim') showed Dr Lim's letter to Mr Kee Hun Kiet a solicitor of Messrs Mak, Ng, Shao & Kee. They discussed the contents of the power of attorney ('PA'). After a few meetings, Kee drafted the PA. Kee asked Badariah to get Dr Lim to certify that Hamid was mentally competent before attending to Hamid's execution of the PA. On 6 February 1998 Kee went to Hamid's house for the execution of the PA. Hamid confirmed to Kee that he wanted the PA to be prepared because Dr Lim advised him to do so. Hamid also confirmed that he wanted Badariah and Shariffah Fatimah ('Fatimah') to be his attorneys. Hamid executed the PA after Kee had explained the PA to him. The PA was subsequently registered at the Johor Bahru High Court on 11 February 1998.

[13] Hamid had an account with LUTH. Cash withdrawals from this account were made between 8 May 1998 till 29 February 2000. The cash withdrawals were made by Hamid by affixing his thumbprint on the cash withdrawal forms. In the ordinary course of its business LUTH's officers had witnessed Hamid's thumb print on the cash withdrawal forms before handing over the money to Hamid. Hamid also withdrew RM1.033m on 8 June 1998. On that occasion Hamid affixed his thumbprint on a 'Borang Pengeluaran Wang' to receive the money in cheque or bank draft. A bank draft for the said sum was subsequently issued to Hamid.

[14] Hamid also held shares in ZASB and LBSB. On 20 February 1998 Hamid transferred 146,708 shares in ZASB and 28,001 shares in LBSB to Badariah. The share transfer transactions were attended by DW12 the owner and manager of Protax Secretarial, a company secretarial firm. Hamid called DW12 on the phone to come over to the house. When DW12 called at Hamid's house Hamid told DW12 that he wanted to transfer all his shares in

ZASB and LBSB to his younger sister Badariah and then told DW12 to make the necessary arrangements which were duly effected.

[15] On 14 October 1999 Hamid also executed a 'suratikatan Hadiah'. According to the *Suratikatan Hadiah*, Hamid wanted to make a gift of his one-half share in the properties to Badariah and Sharifah Nor ('Nor'). The *Suratikatan Hadiah* and the relevant transfer form (Form 14A) was prepared by Rodziah a lawyer. Hamid told Rodziah that he wanted to give the properties to his younger sisters. The execution of the *Suratikatan Hadiah* by Hamid on 14 October 1999 was witnessed by DW6 a close friend and neighbour. Hamid told DW6 that he wanted to transfer the properties to his sisters because of love and affection. DW10 a lawyer attested to Hamid's signature on the Form 14A on 28 October 1999. The transfer could not be registered because of a caveat lodged by Hassan on 24 April 1998. Hassan's caveat was cancelled on 18 February 2000. Notwithstanding this, the transfer could still not be registered due to the entry of another caveat by Zaharah on 3 February 2000.

FINDINGS OF THE COURT

Whether Hamid was physically and or mentally incapacitated from January 1998 onwards

[16] In respect of all three suits the plaintiffs common ground is that Hamid was physically and or mentally incapacitated when all the transactions were allegedly carried out by Hamid. The plaintiff called Dr Lim a consultant physician who attended to Hamid since 1992 until Hamid's demise on 24 April 2000. Dr Lim wrote in a letter that as at 5 January 1998 Hamid was suffering from cerebral infracts, hypertension, diabetes mellitus and dementia; and that Hamid's mental condition was gradually deteriorating. Dr Lim said that the initial suggestion to prepare a PA came from him; his paramount consideration was to enable Hamid to pay his future medical bills and to employ a maid. Under cross-examination, however, Dr Lim also said that his statement in his letter of 5 January 1998 that Hamid's mental will deteriorate in the near future did not happen until March 2000.

[17] In fact, Hamid's physical and mental condition are more comprehensively described in Dr Lim's affidavit affirmed on 3 January 2006 wherein Dr Lim, inter alia, commented on Hamid's medical condition throughout the period Hamid was under his case. The pertinent excerpts from Dr Lim's affidavit are as follows:

2.

(a) ...

(b) ...

(c) ...

(d) Dia tidak lagi datang berjumpa dengan saya sehinggalah pada 14.10.1997. Dan dia telah memberitahu dan memaklumkan kepada saya yang dia berasa jauh lebih baik dan sihat, cuma berasa lemah pada bahagian kakinya.

(e) Adik perempuannya yang bernama Badariah adalah yang orang menjaganya dan membawanya datang berjumpa saya di Hospital; kadangkala ditemani seorang adik lelaki. Hanya Badariah sahaja yang dinyatakan sebagai 'waris terdekat' Syed Hamid dalam rekod/fail Hospital. Saya dapati Badariah adalah seorang yang bertanggungjawab dalam mana dia dapat mengurus serta menjaga Syed Hamid dengan baik dan sempurna.

(f) Jadi saya pun mencadangkan kepada Syed Hamid agar dia membuat suatu Surat Wakil Kuasa untuk membolehkan wangnya dikeluarkan untuk membayar bil-bil perubatannya dengan saya dan pihak Hospital...

(e) ...

(f) ...

(g) Dia juga telah membuat beberapa lagi lawatan ke klinik saya. Pada hari lawatannya pada 10.02.1992, saya dapati keadaan Syed Hamid bertambah baik. Dan pada 09.06.1999 saya dapati dia mampu berjalan dengan menggunakan 'walker'. *Dan bila saya merawatkannya pada 04.08.1999, saya dapati dia dalam keadaan agak sihat, dan ingatannya adalah pada tahap paling baik dan jelas berbanding pada waktu mula-mula saya memeriksanya*.

(h) Pada lawatannya pada 20.01.2000, dia didapati mampu berjalan ke mana-mana, jadi cadangkan agar dia berjalan lebih kerap lagi untuk tujuan senaman. Apabila dia datang kemudiannya pada 29.02.2000, dia kelihatan tidak begitu sihat, lalu saya memasukkannya ke Hospital. Dia keluar dari Hospital pada 27.03.2000. Lawatan terakhirnya adalah pada 10.04.2000.

(i) *Dia pada setiap masa bukanlah seorang yang tidak waras atau gila*. 'Dementia' adalah jauh berbeza dengan kesasauan/kegilaan ('insanity'). Terdapat bermacam-macam jenis 'dementia', dari yang teruk kepada yang 'mild'. *Keadaan Syed Hamid pada sebahagian besarnya jatuh dalam kategori 'mild'*.

(j) *Pada kesemua masa dari 18.01.1998 sehingga 20.01.2000, Syed Hamid mampu berjalan-jalan ke mana-mana, ingatannya adalah agak baik* dan penyakit kencing manis dan darah tinggi yang dihidapinya adalah terkawal. *Dalam tempoh masa ini dia memang mampu membuat keputusan yang berkaitan dengan hal peribadinya*.

(k) Pada 29.02.2000, dia telah dimasukkan ke Hospital dalam keadaan tenat. Pada masa itu, dia tidak akan mampu membuat keputusan disebabkan oleh kerosakan otak. Dia kemudian menjadi tidak waras selepas 29.02.2000 disebabkan oleh kerosakan otak akibat 'severe cerebral infarct' dan tidak lagi mampu membuat sebarang keputusan.

[18] Dr Lim's evidence corroborates the testimonies of Badariah, Salim, Nor and Fatimah regarding Hamid's physical and mental condition during the said period. From 1998 until the date of Hamid's admission into hospital on 29 February 2000, Hamid's physical and mental condition was fairly good. Hamid was able to walk with the aid of a walker. Hamid was healthy and under no mental incapacity.

[19] This evidence is also consistent with the evidence of Kee, who was called by the plaintiffs to testify. Kee the solicitor who attended to the preparation and execution of the PA was initially shown Dr Lim's letter of 5 Janaury 1998. Notwithstanding that, Kee prudently asked for another letter from Dr Lim to certify that Hamid was mentally competent. After receiving Dr Lim's letter dated 25 January 1998, Kee went to Hamid's house for the execution of the PA. Kee took some time to explain the contents of the PA to Hamid before Hamid then executed the PA. After Hamid has executed the PA Kee left the house. In cross-examination Kee said that Hamid confirmed that he wanted Badariah and Fatimah to be his attorneys and that he wanted the PA to be irrevocable. Hamid had no difficulty in understanding Kee and vice versa. Hamid could express himself in a sane manner. As the PA is an important document Kee had to explain the contents to Hamid carefully, which is why it took some time. Kee explained to satisfy himself that Hamid understood what he said.

[20] It is trite that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (a) the burden of establishing a case; and (b) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiffs who must establish their case. If they fail to do so, it will not do for the plaintiffs to

say that the defendants have not established their defence (*Selvaduray v Chinniah* [1939] MLJ 253 (CA); s 102 of the Evidence Act 1950). On the effect of the burden of proof not being discharged, Terrell Ag CJ in *Selvaduray v Chinniah* adopting the position stated by the Court of Appeal in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 said:

> In such a case as the present the position has been clearly stated in the judgment of Brett MR in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 at p 452:
>
> > But then it is contended (I think fallaciously), that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this. It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

Applying the principles laid down by the Court of Appeal in the above case, it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the court that the plaintiff has not established his case and the learned judge has so found.

[21] Whether or not Hamid was mentally incapacitated at the material times is a question of fact. The opinion of Dr Lim who has examined Hamid is relevant and carries considerable weight. However, it is also necessary to assess the question on the totality of the medical and lay evidence (see *Halsbury's Laws of England*, (4th Ed) Vol 30 para 1388). In *Choo Ah Pat v Chow Yee Wah & Anor*

[1974] 1 MLJ 62 the High Court held that the burden of proving that the deceased was non compos mentis at the time when he drew a cheque and executed the document lay with the plaintiff. Abdul Hamid J (later LP) said at p 67:

> Though there was evidence of some mental confusion, its degree was never established. There was also insufficient evidence to justify a finding that the deceased was at all time in the state of mental confusion. Furthermore, I am *not satisfied that there was no probability of any alteration in his mental condition*. The burden should not therefore be shifted to the other party to show that at the material time such mental state ceased to exist. To fortify my view, I cite the following passage in *Sarkar on Evidence*, (12th Ed) p 9912 where it is stated that:
>
> > The drawing of such presumption results in casting the burden of proof on the party against whom the presumption is raised. If a thing or a state of things is shown to exist and the space of time for which it existed is such that there is a probability that there has been no alteration in its conditions, the burden is on the opposite party to show that it has ceased to exist.

I wish to observe that care must be taken when dealing with a general proposition as a rule of evidence for general application as there is this further rule that every man is presumed to be sane until the contrary is proved. It is true that there is this presumption of mental disorder for purposes of contract or disposition where a person has been proved or is admitted to have been mentally disordered as to be incapable for such purposes but whether the presumption is raised in any given case will, I think, depend principally upon the facts of that particular case.

[22] The medical evidence has shown that the general mental condition of Hamid was fair and satisfactory up until 29 February 2000. The medical evidence is also consistent with the lay evidence of Kee, the solicitor who attended to the execution of the PA by Hamid. The court also considered the evidence of Badariah, Salim, Nor and Fatimah. Between 1997 and 1999 Hamid travelled to Kota Bharu, Rantau Panjang, Kulim and Muar on a number of occasions. Badariah and Nor in particular helped look after Hamid; Fatimah looked after Hamid during the period Hamid was hospitalised in February–March 2000. There is also the independent corroborative evidence of the third parties: Kee the solicitor who attended to Hamid in the execution of the PA, Rodziah the solicitor who prepared the *Suratikatan Hadiah*, DW6 the friend and neighbour who attested Hamid's signature on the *Suratikatan Hadiah*, DW12 who attended to the transfer of shares and the officers from LUTH who attended to Hamid for the withdrawals from his account with LUTH.

[23] Applying the principles cited above all that can be shown is that Hamid was not in perfect health. He was suffering from hypertension, diabetes and had a mild stroke from which he had recovered. There was insufficient evidence to justify a finding that Hamid was in a state of mental incapacity. Hamid was

able to exercise his judgment independently and gave instructions to do what he wanted. Furthermore, there is no evidence to show that Hamid's physical and or mental condition had deteriorated. In the light of the evidence the court was unable to find that Badariah or any the other defendants were in position of active confidence vis-a-vis Hamid. On the contrary, the medical evidence shows that Hamid's mental deterioration only came about March 2000. For the foregoing reasons the court finds that Hamid was not physically and or mentally incapacitated from 1998 onwards. Hamid only became physically and mentally incapacitated on 29 February 2000.

Whether the withdrawals of monies in the aggregate of RM1.125m was made fraudulently using Hamid's forged thumbprint

[24] The existence of fraud is a question of fact. It is dependent upon the circumstances of each particular case as stated by the Federal Court in *PJTV v Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 Raja Azlan Shah CJ (Malaya) (as HRH then was) said at p 138:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate,' but 'fraud'... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of which he is entitled' (per Romilly MR in *Green v Nixon*). Thus in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...'.

[25] In this case the onus is upon the plaintiffs to establish the alleged fraud (see ss 102 and 103 of the Evidence Act 1950; *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC)). The standard of proof for an allegation of fraud in civil proceedings is that of proof beyond reasonable doubt (see *Saminathan v Pappa* [1981] 1 MLJ 121; *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371; *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 (FC); *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC)). Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see *Chu Choon Mooi v Ngan Sew Tin* [1986] 1 MLJ 34 at p 38 (SC); *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627; *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23).

[26] There is no evidence to show that the thumbprints affixed on the cash withdrawal forms are forged or that the withdrawals were made fraudulently. The officers from LUTH have testified that the cash withdrawals were made by Hamid and paid out after they have verified Hamid's thumbprint on the withdrawal forms. As for the withdrawal of RM1.033m, the LUTH officers called at Hamid's house to verify Hamid's intention and to obtain Hamid's thumbprint on the relevant forms before subsequently issuing a cheque for the said sum in Hamid's name. The transactions were all carried out in the normal course of business and in accordance with LUTH policies. There is nothing to suggest any impropriety or irregularity. The evidence of the officers from LUTH were challenged under cross-examination but remained materially consistent. There is no cogent reason by way of evidence to the contrary or by reason of the surrounding circumstances to suggest otherwise. There was nothing in their collective demeanour to suggest that they are lying. The court finds that their testimony are credible and reliable (*Balasingham v Public Prosecutor* [1959] MLJ 193 (CA)). The cheque for RM1.033m was paid into Hamid's Hock Hua Bank account and ten fixed deposits were taken out on 24 November 1998. Subsequently the ten fixed deposits were withdrawn and the monies paid into Badariah's personal account. When challenged under cross-examination Badariah said that it was a gift to her. The transfer was done on Hamid's instructions; further, she has a mandate to operate the Hock Hua Bank account. For the foregoing reasons the court finds that the plaintiffs have failed to prove that the withdrawals of monies in the aggregate of RM1.125m was made fraudulently using Hamid's forged thumbprint beyond reasonable doubt.

Whether the transfer of 146,503 shares in ZASB and 28,001 shares in LBSB from Hamid to Badariah was a misappropriation as a result of a breach of trust and breach of fiduciary duty by Badariah and Fatimah

[27] It is the plaintiff's contention that the circular resolution of ZASB authorising the transfer of the shares was fraudulent and ultra vires and that it was concealed from Hassan. It is also void as Badariah signed the resolution. In the first place the circular resolution was made pursuant to article 95 of the Articles of Association of ZASB which provides that 'A resolution in writing signed by a majority of the directors for the time being or their alternates not being less than two directors shall be as valid and effectual as it had been passed by a meeting of directors duly called and constituted'. As the circular resolution was signed by three directors, being a majority of the four directors for the time being, the circular resolution is valid in accordance with article 95. The transfer of the shares in question is from Hamid to Badariah, ie, from one shareholder to another shareholder is not subject to any restrictions; the provisions relating to restrictions of transfer in articles 33–37 of the articles of association are inapplicable. Learned counsel for the plaintiffs also posited that if it was a gift

then how is it that the shares were in recorded as being transferred for value in the circular resolutions, the share transfer forms and the audited accounts of ZASB and LBSB. This would detract from the attribute of a gift (*Wall Mohammad, etc Appellants v Faqir Mohamad & Ors, etc Respondents* AIR 1978 Jammu & Kashmir 92). The case cited is distinguishable as the vendor donee stated that he paid Rs 400 to the vendor donor as consideration for the gift. In this case Badariah did not pay any money to Hamid as consideration for the gift. Badariah's evidence on this is clear and uncontroverted. The explanation that the value was reflected in the circular resolution, share transfer forms and audited accounts merely for stamp duty purpose is plausible. Even if Badariah stood in a fiduciary relation of Hamid or the relation between Hamid and Badariah is such that Badariah was in a position to dominate Hamid's will, the court will not declare the transfer of the shares void as Badariah has shown to the court's satisfaction that Hamid had competent and independent advice in making the gift. For the foregoing reasons the question is answered in the negative.

Whether in furtherance of a dishonest and fraudulent scheme the defendants deprived Hamid of the properties

[28] According to the *Suratikatan Hadiah* Hamid wanted to make a gift of the properties to Badariah and Nor. Flowing from this document Hamid executed the Form 14A. In the Form 14A the transfer is made 'sebagai balasan – kasih sayang'. In other words, the transfer was for love and affection. Rodziah, the solicitor who attended to this transaction testified that Hamid instructed her that he wanted to give the properties to Badariah and Nor. Rodziah then prepared the *Suratikatan Hadiah* and the Form 14A. DW6 attested to the signatures of Hamid, Badariah and Nor on the *Suratikatan Hadiah*. DW6 said that Hamid told him that he wanted to transfer the properties to Badariah and Nor as a gift for love and affection before Hamid signed the *Suratikatan Hadiah*. Hamid was aware and conscious of what he wanted to do. DW6's testimony remained consistent under cross-examination. DW6 was Hamid's neighbour and good friend; he had no personal interest in the subject matter. The court finds DW6 to be a credible and consistent witness. Before Hamid executed the Form 14A Rodziah also reconfirmed Hamid's intention. As Rodziah foresaw that the other siblings might feel that she was involved in persuading Hamid to transfer the properties she asked DW10 to attest to Hamid's execution on the Form 14A. DW10, a solicitor testified that Hamid signed the Form 14A in his presence. DW10 said that before Hamid signed the Form 14A he checked Hamid's identity card, observed Hamid's general condition, behaviour and character in order to satisfy himself as to Hamid's understanding and willingness to sign the Form 14A. Under cross-examination DW10 said that Rodziah told him that she wanted an independent lawyer to attest the signature. On this issue, suffice it to say that after carefully

scrutinising the evidence as a whole the court cannot find anything to justify the plaintiffs' assertion that there was a dishonest and fraudulent scheme. Accordingly, the question must be answered in the negative.

[29] For the foregoing reasons the plaintiffs' claims in Suits 411, 412 and 413 are dismissed with costs. The defendants' counterclaim in Suit 413 is allowed with costs.

Plaintiffs' claims dismissed with costs and defendants' counterclaim allowed with costs.

Reported by Kohila Nesan